Date: June 5, 1997

Case No.: 95-INA-365

In the Matter of:

DAWN D. HOLUBIAK,
Employer

On Behalf Of:

MARIA DULCINEIA SANTOS,
Alien

Appearance: Joel Stewart, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On September 21, 1992, Dawn Holubiak ("Employer") filed an application for labor certification to enable Maria Dulcineia Santos ("Alien") to fill the position of Family Dinner Cook (AF 24-25). The job duties for the position are, "[p]lan and suggest meals. Shop for food and ingredients. Cook food according to recipes and experience. Prepare seafood, meat, and vegetables. Prepare sweets and desserts. Serve dinner. Clean kitchen and dining area."

The requirements for the position are two years of experience in the job offered or two years of experience as a Houseworker/Cook. Furthermore, the Employer listed as Special Requirements, "must be reliable and trustworthy. References required."

The CO issued a Notice of Findings on October 12, 1994 (AF 42-46). The CO proposed to deny labor certification because the job offered was not permanent, full-time employment. Furthermore, the CO found that the Employer's hours were restrictive. Therefore, the CO requested that the Employer document the business necessity of the hours or amend the application. Finally, the CO found that the Employer's alternate experience requirement of two years as a Houseworker/Cook was excessive and restrictive. Therefore, the Employer was instructed to reduce the requirement or document how the requirement arises from a business necessity.

Accordingly, the Employer was notified that it had until November 16, 1994, to rebut the findings or to cure the defects noted.

In its rebuttal, dated November 16, 1994 (AF 47-72), the Employer's Attorney argued that the Employer's requirement of two years of experience as a houseworker is not unduly restrictive because it is only an alternative experience requirement. It was also argued that the required hours (2:20 to 9:30 p.m. with a one-half hour break) are not unduly restrictive as they are normal for the occupation of dinner cook. The Employer submitted two affidavits from professional chefs who state that this is a normal work schedule for a dinner cook. Finally, the Employer argued that the job opportunity is for full-time employment. She stated that the cook would prepare dinner for a family of four, six nights per week. She further stated that she does not engage in extensive entertaining and she previously did not employ a full-time cook.

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

The CO issued the Final Determination on December 2, 1994 (AF 73-75), denying certification because the Employer has not met her burden of proof by establishing that the position meets the definition of full-time employment pursuant to 20 C.F.R. § 656.3.

On December 8, 1994, the Employer requested review of the Denial of Labor Certification (AF 77). On March 24, 1995, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Section 656.3 provides that "employment" means permanent, full-time work by an employee for an employer other than oneself. The employer bears the burden of proving that a position is permanent and full time. If the employer's own evidence does not show that a position is permanent and full time, certification may be denied. *Gerata Systems America, Inc.*, 8-INA-344 (Dec. 16, 1988). Further, if a CO reasonably requests specific information to aid in the determination of whether a position is permanent and full time, the employer must provide it. *Collectors International, Ltd.*, 89-INA-133 (Dec. 14, 1989).

In this case, the CO asked that the Employer supply information regarding the job opportunity (AF 42-45). Specifically, the CO requested that the Employer provide evidence regarding the following: (1) the number of meals prepared daily and weekly, the length of time required to prepare the meals and the number of people for which the meals are prepared; (2) the frequency of household entertaining in the 12 calendar month period immediately preceding the filing of the application, including the dates of entertainment and the number of guests entertained and the number of meals served; (3) the duties, other than cooking, that the Alien will be required to perform; (4) the daily and weekly work schedule of the parent(s), the school schedules of the children, and how the children are cared for when parent(s) are absent from the home; (5) who will perform the general household maintenance duties, such as cleaning, clothes washing, vacuuming, etc., and who is performing them currently; and, (6) whether the Employer has employed full-time cooks in the past.

In rebuttal, the Employer responded that the Family Dinner Cook will cook meals for a family of four, as well as relatives and friends who visit for dinner (AF 63-64). She explained that dinner will be prepared six days a week and the job duties include preparation of the meal, planning menus, shopping, prepping, cooking, serving, and cleaning up. The Employer further stated that she did not entertain extensively during the last year and she does not anticipate doing so in the future.[2] The general household duties are performed by a domestic worker and by the Employer, who works as a volunteer during the day. The Employer asserted that she is home when her children arrive from school and she takes care of them during the evening. Finally, the Employer stated that she has not employed a full-time cook in the past. The Employer also

[2] The Employer further stated that, "I do not agree that I must prove frequent household entertaining during the twelve calendar month period immediately preceding the filing of the application." We agree with this statement; however, we note that this is just one item that is considered in determining whether the job opportunity is full time.

included letters from two professional chefs as part of her rebuttal. Each of these chefs notes that the preparation time required by the Employer is reasonable (AF 47-54).

We emphasize that the Employer bears the burden of showing that the job opportunity is for full-time employment. The Board has held that to establish permanent, full-time employment for a household cook the Employer must show that the position involves more than planning, preparing, and serving household meals, even up to 25 meals per week. *Jane B. Horn*, 94-INA-6 (Nov. 30, 1994). See also, *Marianne Tamulevich*, 94-INA-54 (Dec. 5, 1994) (the employer did not provide evidence supporting the existence of a full-time position); *Mr. & Mrs. Clifford I. Cummings*, 94-INA-8 (Dec. 21, 1994). In this case, the Employer does not have an extensive social or business schedule, there is no indication of special diets or foods, and the Employer has not maintained a cook prior to this instance. Therefore, we find that the Employer has not met her burden of showing full-time employment.[3] Accordingly, the CO's denial of labor certification is hereby AFFIRMED.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

[3] In his brief on appeal, the Employer's Attorney argued that the position of Family Dinner Cook is, *prima facie*, a *bona fide* full-time position. He bases this argument on the fact that the job opportunity is included in the *Dictionary of Occupational Titles*. We disagree as this has no relevance in determining whether a particular job opportunity is a permanent and full-time position. We further note that it is the Employer's burden to prove that the job opportunity is full time and, as such, it was appropriate for the CO to request specific information in the Notice of Findings.

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.